

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY, MISSOURI

FILED
DIVISION 5

CHRISTOPHER P. BORST

JUL 21 2009

Plaintiff,

CIRCUIT COURT OF JACKSON COUNTY, MO

BY

v.

Case No.: 0716-CV02798
DIVISION 5

Criminal Case No.: 16CR02002704-01

STATE OF MISSOURI,

Defendant.

**JUDGMENT ON MOTION FOR POST-CONVICTION RELIEF
(PURSUANT TO RULE 29.15)**

On May 5, 2009, Plaintiff, CHRISTOPHER P. BORST, appeared in person and by counsel, JOHN P. O'CONNOR and MICHAEL L. BELANCIO. Defendant, STATE OF MISSOURI, appeared by counsel, LORI A. FLUEGEL.

The parties announced that they were ready for trial. The case was submitted to the Court upon the pleadings of record.

Evidence was heard on May 5, 2009 and May 6, 2009. The Court also heard arguments of counsel.

After evidence was concluded the Court granted the parties the opportunity to present proposed judgments and advised the parties that the proposed judgments were part of the record that the court would consider in rendering its Judgment. The parties were advised that the case would not be considered submitted until the Court received each proposed judgment.

On JULY 21, 2009, the Court again takes up this matter. The Court makes the following findings and judgment:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has jurisdiction over the parties and the subject matter of this action.

The Court has made judgments on the credibility of various witnesses that are consistent with the findings of fact made in this Judgment.

On June 4, 2002, Movant was arraigned on 4 charges; 1 Count of Statutory Rape, and 3 Counts of Statutory Sodomy. (LF 002). Movant was originally represented by now disbarred attorney, W. Geary Jaco. (SC 86836). Movant entered a plea of not guilty to each of the charges.

The State then presented the case to a grand jury, and, by Grand Jury Indictment, Movant was charged in Case Number 16CR02002704-01 as follows:

Count	Charge Code & Description	Charge Level	Date Of Offense
1	1102100 Statutory Rape - 1st Degree	Felony A	01-MAR-2002
2	1107600 *Disc-Statutory Sodomy--1st De	Felony A	01-MAR-2002
3	1107600 Statutory Sodomy - 1st Degree	Felony A	01-MAR-2002
4	1107600 *Disc-Statutory Sodomy--1st De	Felony A	01-MAR-2002
5	2209000 Incest	Felony D	02-MAR-2002
6	2209000 Incest	Felony D	02-MAR-2002
7	2209000 Incest	Felony D	02-MAR-2002
8	2209000 Incest	Felony D	02-MAR-2002
9	2503400 Furnish Pornographic Material Or Attempt To Furnish To A Minor	Misdemeanor A	02-MAR-2002

Defendant was arraigned thereon on August 6, 2004. (STr. 13).

Movant entered a plea of not guilty to each of the charges and a jury trial was held.

On August 13, 2004 the jury returned a verdict finding Movant not guilty of the following charges:

Count	Charge Code & Description	Charge Level	Date of Offense
1	1102100 Statutory Rape - 1st Degree	Felony A	01-Mar-2002
3	1107600 Statutory Sodomy - 1st Degree	Felony A	01-Mar-2002
5	2209000 Incest	Felony D	02-Mar-2002
7	2209000 Incest	Felony D	02-Mar-2002
9	2503400 Furnish Pornographic Material Or Attempt To Furnish To A Minor	Misdemeanor A	02-Mar-2002

On August 13, 2004 the jury returned a verdict finding Movant guilty of the following charges:

Count	Charge Code & Description	Charge Level	Date of Offense
2	1107600 Statutory Sodomy - 1st Degree 566.062 RSMO	Felony A	01-MAR-2002
4	1107600 Statutory Sodomy - 1st Degree 566.062 RSMO	Felony A	01-MAR-2002
6	2209000 Incest 568.020 RSMO	Felony D	02-MAR-2002
8	2209000 Incest 568.020 RSMO	Felony D	02-MAR-2002

On October 27, 2004, in Division 70 of the Jackson County Circuit Court, before THE HONORABLE CARL DEWITT GUM JR, Judge, Movant, CHRISTOPHER P. BORST, was sentenced in 16CR02002704-01, as follows:

Count	Charge Code & Description	Charge Level	Date of Offense	Term
2	1107600 *Disc-Statutory Sodomy--1st De	Felony A	01-Mar-2002	12 Years
4	1107600 *Disc-Statutory Sodomy--1st De	Felony A	01-Mar-2002	12 Years
6	2209000 Incest	Felony D	02-Mar-2002	2 Years
8	2209000 Incest	Felony D	02-Mar-2002	2 Years

Sentences for Counts II and IV run concurrently with each other. Sentences for Counts VI and VIII run concurrently with each other. Sentences for Counts II and IV run consecutively to sentences for Count VI and VIII, for a total of 14 years confinement.

Movant is currently incarcerated at the Jefferson City Correctional Facility in Jefferson City, Missouri.

Movant timely filed his pro se Motion to Vacate, Set Aside or Correct Judgment and Sentence.

On October 13, 2007, Movant filed an Amended Motion to Vacate, Set Aside or Correct Judgment and Sentence.

In Movant's ground 1, he claims he suffered ineffective assistance of counsel when arraignment counsel Mr. Jaco did not inform Movant of his 5th and 6th Amendment rights. As a result, Movant claims that he spoke to Detective Jana Eickels of the Kansas City Police Department and Tom Bajt and Jill Hazel of the Department of Family Services.

In Movant's ground 2, he claims he suffered ineffective assistance of counsel when trial counsel Mr. Carney and Ms. Keller did not ask Shelby Magnuson about former false accusations against another.

In Movant's ground 3, he claims he suffered ineffective assistance of counsel when trial counsel did not request a continuance when they were notified of the State's introduction of a number of out of court §491.075 statements.

In Movant's ground 4, he claims he suffered ineffective assistance of counsel when trial counsel did not call Dr. Robert Sanders to testify at the §491.075 hearing nor offer proof of his testimony.

In Movant's ground 5, he claims he suffered ineffective assistance of counsel when trial counsel did not call Dr. Roslyn Schultz to testify at the §491.075 hearing, did not illicit further testimony from her at trial, and did not offer proof of her testimony.

In Movant's ground 6, he claims he suffered ineffective assistance of counsel when trial counsel did not call K.B. (a minor child) to testify during the §491.075 hearing, did not voir dire K.B. before testifying at trial, and did not move to strike K.B.'s testimony.

In Movant's ground 7, he claims he suffered ineffective assistance of counsel when trial counsel did not request a bill of particulars.

In Movant's ground 8, he claims he suffered ineffective assistance of counsel when trial counsel did not call Renee Sterling or Erica Sterling.

In Movant's ground 9, he claims he suffered ineffective assistance of counsel when trial counsel did not obtain nor preserve Movant's cellular telephone records and a Ryder™ rental receipt.

In Movant's ground 10, he claims he suffered ineffective assistance of counsel when trial counsel did not object to identifying statements during Dr. Hegenbarth's testimony.

In Movant's ground 11, he claims he suffered in effective assistance of counsel when trial counsel did not request jury instructions about lesser-included offenses.

In Movant's ground 12, he claims he suffered ineffective assistance of counsel when trial counsel did not object during the State's closing arguments.

In Movant's ground 13, he claims he suffered ineffective assistance of counsel when trial counsel did not raise Movant's object to State's closing arguments (ground 12) in the Motion for New Trial.

In Movant's ground 14, he claims he suffered ineffective assistance of counsel when trial counsel did not obtain nor use medical records, childcare records, and other witnesses to impeach Shelby Magnuson.

On May 5, 2009 and May 6, 2009, the Court heard evidence and argument in the above captioned case.

SUMMARY OF WITNESSES AND EXHIBITS

The Court heard testimony from four live witnesses and admitted 18 exhibits into evidence.

Marilyn Keller, one of Mr. Borst's trial counsel, testified in Movant's case-in-chief.

Michelle Hanks (nee Miller), who was a believable and credible witness in this proceeding. The Court concludes that any jury who saw and heard Ms. Hank's testimony would have given significant weight to the testimony and would likely have returned a different verdict in this proceeding. Ms. Hanks was moved to tears when she was telling

the Court of her struggles with DFS due to the false allegations of abuse levied against her by Shelby Magnuson, and this would have been powerful testimony in the trial had it been presented.

Ms. Hanks confronted Shelby about various representations that Shelby had told her in the process of leaving Mr. Borst beginning her relationship with Dr. John Magnuson. During that confrontation, Shelby admitted that she had made various misrepresentations of fact and admitted to falsely accusing Movant Christopher Borst, of prior acts of physical abuse.

Ms. Hanks also testified that Shelby discussed her brother, Vance's, own troubles for abusing his own daughters where the discovery method was playing with Barbie dolls.

Movant also testified on his own behalf. His testimony was consistent with that of Ms. Hanks and Ms. Keller.

Richard Carney, Mr. Borst's lead trial counsel, testified for the State in the State's case-in-chief. From the start of his testimony, it seemed that Mr. Carney was antagonistic toward his former client, and toward Mr. O'Connor during cross-examination of Mr. Carney. Mr. Carney did not behave in the manner of attorneys, who routinely appear in criminal matters in this Court. On at least three (3) occasions Mr. Carney began to leave the witness stand in an obviously agitated state in the direction of Mr. O'Connor. This conduct was in response to hard questions fairly and properly propounded by Mr. O'Connor in a professional manner. The response by Mr. Carney was clearly inappropriate.

Further, Mr. Carney's testimony often times conflicted with that of his co-counsel, Marilyn Keller (whom the Court believes over Mr. Carney) and with the transcripts themselves.

Mr. Carney's demeanor, belligerent behavior, and non-responsive answers during the course of his cross-examination raise serious concerns in the Court's mind as to whether Mr. Borst received constitutionally adequate representation at his trial. In a non-responsive manner, Mr. Carney would attempt to insert conversations with Mr. Borst concerning penis size braggadocio, where the questions asked were on wholly unrelated issues.

When Mr. Carney was asked if he had read the Court of Appeal's opinion he responded that he had not. Mr. Carney was then informed of certain statements by the Court of Appeals at pp. 15-17, concerning failure to follow proper procedures for the preservation and evidentiary/impeachment foundations regarding the evidence at issue. Mr. Carney responded that the Court of Appeals was wrong.

The exhibits were as follows:

- Exhibit 1 – Dr. Sander's report.
- Exhibit 2 – Waiver of Conflict for appellate counsel to act as 29.15 counsel.
- Exhibit 3 – May 31, 2000 letter.
- Exhibit 4 – June 13, 200 letter.
- Exhibit 5 – June 30, 200 letter.
- Exhibit 6 – Court of Appeal's Memorandum.
- Exhibit 7 – Appellant's Appeal Brief on Appeal (WD 64849).
- Exhibit 8 – States' Respondent's Brief on Appeal.
- Exhibit 9 – Appellant's Reply Brief on Appeal.
- Exhibit 10 – Record on Appeal (Vol. 1).
- Exhibit 11 – Record on Appeal (Vol. 2).
- Exhibit 12 – Binder of Hearings, Trial and Sentencing:
 - (a) August 6, 2004 Hearing;
 - (b) Trial Starting on August 9, 2004; and
 - (c) Sentencing on October 24, 2004.
- Exhibit 13 – Court of Appeals denial of transfer.
- Exhibit 14 – Per Curium Decision.
- Exhibit 15 – Application for Rehearing/Transfer.
- Exhibit 16 – Supreme Court Application for Transfer.
- Exhibit 17 – Supreme Court Mandate.
- Exhibit 18 – Movant's typed explanation to Mr. Carney.

The State introduced no exhibits.

SUMMARY OF APPLICABLE LAW

Rule 29.15

MOVANT seeks post-conviction relief. The scope of the remedy available to MOVANT is set out in Rule 29.15, which reads in pertinent part:

29.15. Conviction After Trial--Correction

(a) Nature of Remedy--Rules of Civil Procedure Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure to be followed for motions filed pursuant to this Rule 29.15 is governed by the rules of civil procedure insofar as applicable.

The purpose of this rule governing motions to vacate a judgment and sentence is to determine whether or not Movant's original trial was violative of any constitutional requirements, or, whether or not the judgment is otherwise void. *Green v. State*, 581 S.W.2d 478, (Mo. App.1979). This process is a means for review of alleged constitutional defects which were not knowingly and voluntarily waived and of asserted defects not passed upon by reviewing court on direct appeal of case. *Wilhite v. State*, 614 S.W.2d 33, (Mo. App.1981).

A post-conviction proceeding cannot function as substitute for second appeal but, rather, it is a forum for review of alleged constitutional deficiencies which were not passed upon by reviewing court in direct appeal of case. *Pollard v. State*, 628 S.W.2d 430, (Mo. App.1982).

Law Applicable To Denial Of Effective Assistance Of Counsel

The Sixth Amendment recognizes an accused's right to the assistance of counsel and envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. Strickland v. Washington, 466 U.S. 668, 685 (1984).

An accused is entitled to be assisted by an attorney, whether retained or appointed, who fulfills the role necessary to ensure that the trial is fair. Id.

For this reason, the Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." Id. at 686 (citing McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970)). Counsel can deprive a defendant of the right to effective assistance simply by failing to render "adequate legal assistance." Id.

Claims of ineffective assistance of counsel are generally governed by the framework of Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the Court stated the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

Thus, to establish ineffective assistance of counsel, the petitioner must show (1) that counsel's performance was objectively deficient, rather than the product of reasonable, but unsuccessful, trial or appellate strategy, and (2) that he was "prejudiced" by counsel's errors. Id. at 688-89 and 693.

A movant in proceedings to vacate sentence who alleges denial of effective assistance of counsel must demonstrate that alleged neglect of counsel with respect to investigation of the case resulted in prejudice to defendant's position and deprived the Movant of substantial rights. McKnight v. State, 497 S.W.2d 201, (Mo. App.1973). To

prevail on a claim of ineffective assistance of counsel, Movant must show that his trial counsel's performance was not only deficient, but also that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). A Movant "must satisfy both the performance prong and the prejudice prong to prevail on an ineffective assistance of counsel claim." Sanders v. State, 738 S.W.2d 856, 857 (Mo.banc 1987) (emphasis in original). The Court may proceed directly to the issue of prejudice without first determining whether counsel's conduct was deficient. Strickland, supra at 697; Sanders, supra.

Prejudice is not presumed from a showing of deficient performance by counsel, but must be affirmatively proven. Strickland, supra at 693; Sidebottom v. State, 781 S.W.2d 791 (Mo.banc 1989). A Movant has the burden of establishing prejudice by a preponderance of the evidence. State v. Young, 844 S.W.2d 541 (Mo.App. 1992). In order to show prejudice, Movant must show that there is a reasonable probability that, absent the alleged error, the results of the proceeding would have been different. State v. White, 798 S.W.2d 694 (Mo. 1990). Reasonable probability has been defined to be ". . . [p]robability sufficient to undermine . . . confidence in the outcome [of the proceeding]." Id., at 697. In order to determine if a reasonable probability exists, the Motion Court must consider the totality of the evidence. Strickland, supra at 691-96; Jones v. State, 773 S.W.2d 156 (Mo.App. 1989).

Petitioner is not required to show that it is more likely than not that the verdict or other result would have been different but for counsel's performance. Id. Rather, a "reasonable probability" is simply one that undermines the court's confidence in the trial's outcome. Id.

Further, in determining if counsel's performance was deficient, this Court must consider whether counsel's conduct was "reasonable". The Motion Court begins its review of trial counsel's competency and reasonableness of trial counsel's conduct with the presumption that counsel is competent. Amrine v. State, 785 S.W.2d 531 (Mo. banc 1990). A Movant must also overcome the presumption that counsel's challenged acts or omissions were sound trial strategy. State v. Starks, 856 S.W.2d 334 (Mo. banc 1993). The Court, in the Jones, supra, case admonished:

The motion court should make every effort to eliminate the distortion wrought by hindsight and to evaluate the challenged conduct from counsel's perspective at the time of the conduct. There is a strong presumption that criminal defense counsel's conduct falls within the "wide range of professional assistance," and a Movant must overcome the presumption that certain actions of counsel might be regarded as sound trial strategy. Jones at 158.

A court deciding an actual ineffective assistance claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. Id. at 290.

Once a convicted defendant identifies acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Id.

The Missouri Supreme Court has stated this test as follows: did defendant's counsel's performance "conform to the degree of skill, care, and diligence of a reasonably competent attorney" State v. Butler, 951 S.W.2d 600, 608 (Mo. banc 1997).

This is the standard that is recognized and followed by the Western District of Missouri. Black v. State, 151 S.W.3d 49, 54 (Mo. banc 2004); Peterson v. State, 149 S.W.3d 583 (Mo. App. 2004).

Finally, in adjudicating a claim of ineffectiveness of counsel, the court must keep in mind that the principles set forth by the Supreme Court in *Strickland* “do not establish mechanical rules.

Although those principles guide the process of decision, *the ultimate focus must be on the fundamental fairness of the proceeding whose result is being challenged.*

In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” *Strickland*, 466 U.S. at 696 (emphasis added).

A post-conviction relief movant need not cite every fact in his motion, but merely the ultimate facts. *Buchli v. State*, 242 S.W.3d 449, 453 (Mo. App. 2007).

Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Edwards v. State*, 200 S.W.3d 500, (Mo. 2006).

Substantive Facts

Mr. Borst’s theory of defense at trial was that ex-wife set him-up; that the child was not abused, and the fabrication of abuse was a cunning ruse to allow the ex-wife to relocate to Joplin with her paramour, Dr. John Magnuson, and child, K.B.

Part of the evidence along in support of the same was that the ex-wife made 5 prior false allegations of abuse, including false allegations made against Michelle Miller, ex-wife’s friend.

The Court believes that the issue of failure to lay the proper foundations for the impeachment evidence listed in the previous paragraphs is dispositive in this action.

The Facts Prior to Accusations of Abuse

Christopher Borst and Shelby Whitehouse ("Shelby") were married in April of 1996. There was one child, K.B., born of the marriage. K.B. was born on October 7, 1998.

In 1998 through 1999, Shelby's brother, Vance Whitehouse ("Whitehouse") was charged with and convicted of sexually abusing his daughters (rape and sodomy). (Tr. 319-320, 345, 349). This fact was further corroborated by Miller's 29.15 hearing testimony.

The allegations of abuse in that case arose from Whitehouse's children playing with their Barbie's in a sexually suggestive manner. (Tr. 345). This fact was further corroborated by Miller's 29.15 hearing testimony.

Shelby had detailed knowledge of the facts in Whitehouse's case, and of the proceedings and results thereof. (Tr. 319). This fact was further corroborated by Miller's 29.15 hearing testimony.

Borst and Shelby separated in July of 1999. (Tr. 535). This fact was further corroborated by Miller's 29.15 hearing testimony.

When Shelby moved-out in July 1999, she accused Borst of being physically abusive toward her. (Tr. 344, 542). This fact was further corroborated by Miller's 29.15 hearing testimony.

Shelby moved in with her good friend, Michelle Miller, her husband, Jason, and their child A.M. (Tr. 276, 542). This fact was further corroborated by Miller's 29.15 hearing testimony.

In early 2000, Borst discovered, through Michelle Miller, that Shelby had been having an affair with Dr. John Magnuson ("Magnuson") for some time and potentially

prior to their separation, but at least as early as July 16, 1999. (Tr. 277, 541). This fact was further corroborated by Miller's 29.15 hearing testimony.

Shelby knew Magnuson since they were college students together from 1991 through 1995. (Tr. 276-277).

While separated, Shelby would fly to Chattanooga, Tennessee to see Magnuson, and would leave K.B. with the Millers. (Tr. 280-281, 543). This fact was further corroborated by Miller's 29.15 hearing testimony.

In February 2000, Michelle Miller discovered that Shelby was lying to her about: a) the alleged physical abuse by Borst, b) trying to get a job, c) secreting financial support she was receiving from her parents, and d) secreting financial support she was receiving from Borst; where the Millers were financially supporting her and giving her a place to live for free. (Tr. 350-352, 652-657). This fact was further corroborated by Miller's 29.15 hearing testimony.

When Michelle Miller confronted Shelby with these facts, Shelby threatened to report Michelle Miller to DFS for abusing K.B. and for abusing Miller's own son, A.M. (neither of which occurred) (Tr. 318-319, 344). This fact was further corroborated by Miller's 29.15 hearing testimony.

Shelby moved out of Miller's house and moved in with her parents in February 2000. (Tr. 281). This fact was further corroborated by Miller's 29.15 hearing testimony.

In May 2000, Michelle Miller hired an attorney and sent a letter to Shelby. (Tr. 344). This fact was further corroborated by Miller's 29.15 hearing testimony. (Exs 3-5).

Shelby then called Miller and told her that she had reported Miller to DFS for abusing K.B. and A.M. (Tr. 344). This fact was further corroborated by Miller's 29.15 hearing testimony.

Shelby denied making the actual reports (which is refuted by Miller's testimony), but readily admitted during a non-jury hearing that she threatened Miller with making said complaints to DFS. (STr. 107-108).

Borst and Shelby's divorce was finalized in March 2001. (Tr. 282). Pursuant to the divorce decree and Borst and Shelby's agreement prior to the divorce finalization, Borst had joint legal custody and very liberal visitation rights with K.B. (Tr. 282-283, 536-537).

Not only did Borst have liberal visitation rights on every Monday and Friday and on every other weekend, (Tr. 282-283, 536-537), he exercised them and arranged his entire work/travel arrangements around his custody time with K.B. (Tr. 549-550, 282-283, 537). In addition, Borst had right of first refusal to have custody of K.B. on days when Shelby could not care for her. (Tr. 538).

In October 2001, Shelby moved in and cohabitated with Magnuson. (Tr. 281, 554-555).

Shelby brought-up the topic of moving to another city with K.B. and Magnuson on about 6 or 7 occasions. (Tr. 555).

By February 2002, Magnuson had already accepted a position in Joplin, Missouri. (Tr. 556-558).

The last time that Shelby broached the topic of moving out of town with Magnuson was on March 2, 2002; subsequent to Magnuson's acceptance of the new job in Joplin. (Tr. 560).

Magnuson's acceptance of the new job was not disclosed to Borst on or prior to March 2, 2002. (Tr. 556-557).

Borst had on some occasions stated agreement with Shelby and K.B. moving with Magnuson to another city, so long as the city was within an hour of an international airport, as Borst's job required frequent air-travel within a 12-state area. (Tr. 557-558).

However, Shelby and Magnuson wanted to move to a rural area because the more urban areas were overcrowded with doctors in Magnuson's specialty, pediatricians. (Tr. 557). Mr. Borst refused to agree to Shelby's request to relocate to a rural area not within one (1) hour of an international airport.

In March 2002, Shelby filed a Petition in Family Court seeking sole custody of K.B. (Tr. 283). On May 1, 2002, Shelby wrote Borst informing him that she and K.B. would be moving to Joplin. (Tr. 284). In October 2002, Shelby married Magnuson. (Tr. 261).

The Allegations of Abuse

Again, on March 2, 2002, Shelby discussed with Borst her and K.B. moving out of town with Magnuson to the Joplin area. (Tr. 560).

Unknown to Borst, Magnuson had already accepted a job in Joplin in February 2002. (Tr. 556-558).

Borst did not agree with them moving to Joplin. (Tr. 556).

On March 3, 2002, the allegations of abuse began. (Tr. 264). The allegation arose from Shelby's purported observation of K.B. playing with her Barbies in a sexually suggestive manner. (Tr. 264).

Shelby purportedly asked K.B. about this, and K.B. allegedly said she learned it from Borst. (Tr. 265).

She further questioned K.B. asking her "does dad touch you?"

That day K.B. also allegedly told her “I had to sit on dad’s lap and stuff comes out of dad’s pee-pee.” (Tr. 265).

Shelby then called Magnuson, (Tr. 266), and took K.B. to Children’s Mercy Hospital for an evaluation. (Tr. 266).

At this time, John Magnuson was a doctor in pediatrics at Children’s Mercy Hospital. (Tr. 470).

Absence of Physical Evidence

On March 3, 2002, Mary Hegenbarth, M.D., performed a sexual assault forensic examination on K.B. (Tr. 451).

At the time of the examination, Dr. Hegenbarth was Magnuson’s superior at Children’s Mercy, and knew that he had accompanied K.B. in for the examination. (Tr. 470-472).

During the examination, K.B. was “energetic and cooperative ... [and] ... seemed like a normal 3-year old.” (Tr. 476-477).

The results of the physical examination were inconclusive. (Tr. 468). Pursuant to Dr. Hegenbarth, K.B.’s exam was normal. (Tr. 467).

Any of the physical findings that Dr. Hegenbarth found were either common injuries of children of that age or were preexisting. (Tr. 460, 480).

Dr. Hegenbarth noted that a small perineum tear was consistent with constipation. (Tr. 480-481), which K.B. had a history of constipation. (Tr. 481).

Based on the physical exam, Dr. Hegenbarth could not say to a reasonable degree of medical certainty that sexual abuse had occurred. (Tr. 488).

With the absence of any physical evidence against the Movant, this matter came down to a he said/she said, between Borst and Shelby Magnuson, where the child had no

actual recollection of any events, and where there was substantial evidence that Shelby Magnuson coached the child witness.

To wit:

6 Q. Kelsey, when we talked the other
7 day, I asked you what you remember that
8 happened when you were with Chris. Do you
9 remember me asking you that?

10 A. Yeah.

11 Q. Okay. And when I was talking to
12 you, I wanted to know from you, has anybody
13 tried to help you remember what happened?

14 A. My mommy and daddy. [daddy in this case refers to John Magnuson]

15 Q. And what did they try and help you
16 remember?

17 A. What Chris did to me.

18 Q. Okay. And what did they do? What
19 did they tell you?

20 A. The same thing that I told you last
21 time.

22 Q. Can you remind me of that?

23 A. Yeah.

24 Q. Okay. Has your mommy talked to you
25 about secret touching?

1 A. Yes.

2 Q. How many times has your mommy talked
3 to you about secret touching?

4 A. A lot.

5 Q. Has your mommy talked to you about
6 Chris?

7 A. Yes.

8 Q. And how many times has your mommy
9 talked to you about Chris?

10 A. I don't remember.

11 Q. Was it a lot?

12 A. Yep.

13 Q. And what has she told you?

14 A. About remember, and what Chris did
15 to me.

16 Q. What do you mean, honey?

17 A. Oh, I don't get it.

18 Q. When you say your mommy has talked
19 to you about what Chris did to you, what do
20 you mean?

21 A. Well, like... **Well, mommy has**
22 **helped me remember.**

23 Q. **And when is the last time you talked**

24 to your mommy about trying to remember what
25 happened?

255

1 A. The last time?

2 Q. Yes.

3 A. Last night.

4 Q. Last night?

5 A. Yes.

(Tr. 253-255).

CONCLUSIONS OF LAW

Ground 1

Arraignment counsel Gary Jaco's failure to ensure Movant knew of, understood, and protected his right to remain silent and to have an attorney present did not prejudice Movant. It is clear from the Movant's testimony at trial that Gary Jaco had informed the movant that he should not speak to anyone further about the case as the following exchange occurred during cross examination:

Ms Fluegel: And you stated to her—Detective Eikel, I'm sorry—at that time that the attorney told you that you had talked too much already by speaking to the Division of Family Service?

Defendant: Yes.

Ms Fluegel: That—

Defendant: That part is correct, And that statement made to me by the attorney was also correct. (Tr. 615).

Clearly movant had discussed with Gary Jaco his statement to the Division and was advised by Mr. Jaco not to talk to anyone else as he had already talked to much to the Division.

In addition, when Movant spoke to representatives of the Department of Family Services, he was not in custody nor being interrogated, which are the two requirements for Miranda to apply. He also went freely to the interview and was aware that he was free to leave at anytime. (Tr. 489 – 506).

While Movant's statements were introduced against him at trial, it was not at the fault of Mr. Jaco. Therefore, Movant has not shown he was prejudiced by Mr. Jaco's actions. Since Movant has not shown he suffered any prejudice, there is no need for this Court to analyze counsel's performance. Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 1.

Ground 3

When trial counsel did not request a continuance when notified of the State's intent to use various out of court §491.075 statements, Movant was not prejudiced. The §491.075 hearing addressed the issue of out of court statements and the Court permitted these statements to be admitted as evidence (Tr. 871). The issue was reviewed on appeal and the Court upheld their earlier decision, denying motion for a new trial (Tr. 873 – 874). Additionally, trial counsel, through cross-examination, was able to rebut these statements. (Movant's Amended Motion To Vacate, Set Aside, or Correct the Judgment of Sentence, p. 6 #39). Furthermore trial counsel Rick Carney testified the movant did not want the case to be continued for any reason and wished to proceed to trial.

Movant has not stated how he was prejudiced by trial counsel's failure to request a continuance. Moreover, Movant has stated these statements were rebutted and thus

there is little room for prejudice. Because Movant has not proved he was prejudiced by trial counsel's actions, there is no need for this Court to look at trial counsel's performance. Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 3.

Ground 4

Trial counsel's choice not to call Dr. Robert Sanders to testify or make an offer of proof did fall below a reasonable standard. Counsel is required to make the necessary record to preserve error when a ruling by the Court restricts or prohibits the presentation that is material to the cases. In this case, the Court granted the State's motion to exclude Dr. Roberts Sanders' testimony (Tr. 10). No offer of proof was made to preserve error.

However, Movant was not prejudiced by trial counsel's actions. Trial Counsel, Rick Carney and Marilyn Keller testified the decision not to call Dr. Sanders was trial strategy given his testimony would be cumulative as counsel intended to call Dr. Roslyn Schultz and the testimony of Dr. Sanders may lead to unfavorable testimony regarding the defendant's character. Movant claims this testimony would have proved questioning of K.B. was tainted and not in conformity with proper protocols. These were trial strategy decisions made by counsel, and the record does not support a claim that Movant was unduly prejudiced through trial counsel not calling Dr. Robert Sanders

This Court finds that trial counsel's action in the aforementioned situation was reasonable and well within sound trial strategy Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 4.

Ground 5

Trial counsel exercised reasonable competence when they did not call Dr. Roslyn Schultz to testify at the §491.075 hearing and did not elicit further testimony from her

during the trial. Trial counsel's choice not to call Dr. Roslyn Schultz at the §491.075 hearing is a matter of sound trial strategy which is virtually unchallengeable and it is not the position of this Court to question that.

Counsel chose to call Dr. Roslyn Schultz at trial. Dr. Roslyn Schultz testified to the procedures, which are generally followed for investigating child sexual assault cases.

The following exchange was had:

Ms. Keller: Okay. And in terms of what we know in this case, specifically in terms of the actual videotaped interview, you had an opportunity to review that, and were there suggestive or leading questions that were utilized in this interview?

Dr. Schultz: Yes

Ms. Fluegel: Objection, Your Honor, may we approach?

The State then objected to Dr. Roslyn Schultz testifying as to the credibility of any of the witnesses. The following exchange was then had"

The Court: Well, it's [techniques used when questioning a child] her area of expertise but you can't comment on the credibility of the victim in this case. She can't get into that. If she does, it's all going to be stricken.

Ms. Keller: ...It you're telling me I cannot ask her any questions about specific questions that were asked in this case, then - -

The Court: Yes, I am. She can't go into a specific question and say this was a highly inappropriate questions, and therefore, you can't trust the answer. (Tr. 644)

The Court again sustained the State's objection on page 651 of the transcript stating, "[y]ou can't go beyond having this witness tell whether or not in her opinion this was a proper technique".

Trial counsel's purpose for calling Dr. Roslyn Schultz to testify was to discredit the testimony of those who questioned K.B. Trial counsel heeded the Court's instruction,

which limited their questioning. Even so, trial counsel was still able to adequately impeach the questioning techniques used with K.B.

Even with the restriction placed upon them by the Court, trial counsel was still able to execute their theory of the defense. This Court finds that trial counsel's action in the aforementioned situation was reasonable and well within sound trial strategy. Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 5.

Ground 6

Movant was not prejudiced when trial counsel did not call K.B. during the §491.075 hearing nor when cross-examining K.B. at trial nor when not requesting K.B.'s testimony be stricken. K.B. testified at trial and was subjected to cross-examination. Therefore, Movant was not prejudiced by K.B.'s absence from the §491.075 hearing. Additionally, counsel had spoken with K.B. prior to her testimony in court and was prepared for K.B.'s statements. Therefore, there was not a need to voir dire the victim. Additionally, because K.B. was subjected to cross-examination, Movant was not prejudiced by her statements made in court and counsel made a strategic decision not to strike K.B.'s testimony

Further, trial counsel's cross-examination technique of K.B. was part of an acceptable trial strategy to attach the credibility of K.B.'s testimony without seeming to attach the young child herself. Trial counsel's strategy in cross-examining the victim meant to alert the jury to the fact the minor's mother had spoken to K.B. about the alleged events and that K.B.'s memory had changed after speaking with her mother; which trial counsel successfully did. (Tr. 254 – 256). Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 6.

Ground 7

Movant fails to show prejudice in his claim that trial counsel failed to request a bill of particulars. Movant was aware the charged events occurred within a nineteen and a half (19 ½) hour period of time. (Tr. 560 – 569). Movant has failed to show by a reasonable probability that a bill of particulars would have altered the result of the proceeding. Movant testified that on the evening in question he was alone with K.B. (Tr. 562 – 568). Movant had an opportunity to testify to all events occurring within the 19 ½ hours in which the abuse allegedly occurred. Movant did not testify to an alibi, which was his choice.

Since Movant has not shown he suffered any prejudice, there is no need for this Court to analyze counsel's performance. Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 7.

Ground 8

Renee or Erica Sterling's testimony would not have qualifiedly supported Movant. Trial counsel presented his theory of defense through various witnesses and argument to the court. Trial counsel first alluded to a possible fabricated story and Shelby Magnuson's motive for doing so in his opening statement. Trial counsel again alluded to his theory of defense when questioning the victim, the defendant's mother, and even with the defendant himself. Trial counsel's closing argument also alluded to a possible fabricated story. There is no reason presented by Movant that would state Renee or Erica Sterling's testimony would have qualifiedly supported his defense. Movant has failed to show he suffered actual prejudice from trial counsel's failure to call Renee or Erica Sterling as a witness. Since Movant has not shown he suffered any prejudice, there is no need for this Court to analyze counsel's performance. Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 8.

Ground 9

Movant has failed to show any prejudice resulting from trial counsel not obtaining and preserving Movant's cellular telephone records of March 2, 2002 between 8:30 a.m. and 10:00 a.m. and the Ryder™ rental receipt. Movant testified to the events occurring on the morning of March 2, 2002, he did not refer to any phone calls made or received that morning. (Tr. 562 – 568). Additionally, Movant testified that K.B. was picked up by her mother at 10:00 a.m. and he picked up the Ryder™ truck after that. (Tr. 569 – 571). Movant did not present testimony at trial nor now that the phone records or rental receipt would have eliminated the window of opportunity for Movant to harm K.B. Movant has not shown that he was prejudiced by trial counsel's failure to enter these items into evidence.

Since Movant has not shown he suffered any prejudice, there is no need for this Court to analyze counsel's performance. Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 9.

Ground 10

Trial counsel was not ineffective for not objecting to statements by Dr. Mary Hegenbarth that potentially identified the Movant as the perpetrator of the alleged abuse.

The testimony Movant is referring to is:

Ms. Wagoner: What type of sexual contact was reported by the social worker to you?

Dr. Hegenbarth: Could I refer to my notes? Is that okay?

Ms. Wagoner: Yes

Dr. Hegenbarth: What she told me, and I'm referring to the notes from that day, what that the patient stated "they"- - she's talking about her father—"watched a movie with naked people in it." Patient further stated dad told me to sit on his lap, stuff

came out of his pee-pee. Dad touched me and told me it would feel good.

Dr. Mary Hegenbarth was not asked specifically, “who is the perpetrator?” she was merely reciting what she had been told on the night in question. Could trial counsel have objected to this statement, of course, however they did not. Not objecting to a statement during the course of a trial does not amount to ineffective assistance of counsel. Movant has failed to show that trial counsel’s failure to object to one statement by Dr. Mary Hegenbarth substantially affected the outcome.

Movant has failed to prove any prejudice and has failed to show that but for the actions of trial counsel, there would have been a different outcome. Since Movant has not shown he suffered any prejudice, there is no need for this Court to analyze counsel’s performance. Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 10.

Ground 11

Child molestation in the first degree is a lesser-included offense of statutory sodomy in the first degree. Trial counsel did not ask for this instruction to be included as a matter of trial strategy. Trial counsel did not want to give the jury another ability to convict the Movant; they wanted a guilty verdict or an acquittal, there were no other options. Trial strategy is virtually unchallengeable. Movant has failed to show that a jury who convicted him of statutory sodomy in the first degree would have opted to convict him of child molestation in the first degree. Moreover, the lack of this instruction may have been beneficial to Movant. The jury acquitted him of two of the counts of statutory sodomy in the first degree and if faced with the lesser-included offenses the jury may have convicted him rather than acquit him. The Court finds no basis for Movant’s claim.

Trial counsel exercised sound trial strategy and it is not the position of this Court to question that. Movant suffered no prejudice from the decisions of trial counsel and therefore there is no need for this Court to analyze counsel's performance. Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 11.

Ground 12

Movant was not prejudiced by trial counsel's failure to object during the State's closing argument when prosecution stated K.B. said, "I'm showing her what daddy did" (Tr. 740), nor was he prejudiced when trial counsel failed to object when prosecution accused Movant of being "a sex offender."

In the direct examination of Melinda Houdyshell, she testified that she found her daughter and K.B. both naked from the waist down and lying on top of one another. (Tr. 332). When Melinda Houdyshell questioned the girls as to their actions, K.B. stated, "I was showing Maya what daddy taught me". (Tr. 332). Therefore State's statement, "I'm showing her what daddy did" is supported by the record and Movant has failed to show prejudice or that State's statement decisively effected the jury's determination. (Tr. 740).

The jury was instructed to weigh all evidence and only convict if there is no reasonable doubt in their minds. The system in which Missouri law operates dictates that closing arguments are just that, arguments, not evidence. This system entrusts each juror understands the difference. Movant has failed to show that the jury in this trial confused the evidence and the arguments. Thereby, Movant has failed to show that counsel's failure to object to the State's closing remarks had a decisive affect on the outcome of the proceedings.

The failure to object during closing arguments did not prejudice the Movant. Since Movant has not shown he suffered any prejudice, there is no need for this Court to

analyze counsel's performance Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 12.

Ground 13

Movant states trial counsel failed to object and preserve for appeal Movant's objection to the State's closing statement, "Somebody is lying here. And it's the defendant." (Tr. 796). Trial counsel did object and therefore did preserve Movant's objection for appeal. (Tr. 796) Trial counsel even asked for a mistrial. (Tr. 797). The Court overruled the objection and denied the mistrial. (Tr. 797). Movant has not made a showing that trial counsel's performance fell below an objective standard of reasonable competence.

Further, Movant has not shown he suffered prejudice from the aforementioned situation. The Court overruled the objection of trial counsel. (Tr. 797). The Court did not deem the statement prejudicial at that time nor does it find it prejudicial today. Movant has not met the burden of showing the comments had a decisive affect on the jury's determination. Because the statement did not result in prejudice to the Movant, whether it was preserved for appeal or not is a moot point.

Movant has failed to satisfy both the prejudice and reasonable standard requirements for ineffective assistance of counsel. Movant is not entitled to relief under Missouri Supreme Court Rule 29.15 based upon Ground 13.

Grounds 2 and 14

Where a case is based on a he said/she said situation where the credibility of witnesses is essential, any evidence going to bolster or discredit the witnesses can be prejudicial to the defense. *State v. Banks*, 215 S.W.3d 118, 122 (Mo. banc 2007).

The Supreme Court in *State v. Long*, 140 S.W.3d 27, 30 (Mo. banc 2004), a sex case, held that “Missouri law allows a party to attack the credibility of witness by demonstrating the witnesses’ bad character for truth and veracity.”

The *Long* Court further stated:

Where, as in this case, a witness’ credibility is a key factor in determining guilt or acquittal, excluding extrinsic evidence of the witnesses’ prior false allegations deprives the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy; the credibility of the witness. An evidentiary rule rendering non-collateral, highly relevant evidence inadmissible must yield to the defendant’s constitutional right to present a full defense.

Id. at 30-31 (emphasis added).

This concept was also discussed in *State v. Thomas*, 118 S.W.3d 686, 689 (Mo. App. 2003). The *Thomas* Court stated, “A criminal defendant has a constitutional right to confront the witnesses against him. This includes the right to cross-examine a witness to expose to the jury any motivation, including potential bias or prejudice, which may influence his testimony.” *Id.* (internal citations omitted). The Court of Appeals reversed and remanded because the trial court did not allow defendant to cross-examine witnesses about their biases. *Id.* at 691.

The Trial Court did not permit Borst to cross-examine Shelby on these issues, and did not permit Borst’s witnesses to be called for impeachment purposes. (Tr.349, 356, 357, 658). The Trial Court did not permit Borst to call Ms. Hanks (then Miller) to the stand to testify to the prior false allegations of abuse.

Trial counsel did not ask the proper questions of Ms. Shelby Magnuson to lay the proper foundations for the admissibility of the above impeachment testimony concerning prior false allegations of abuse. Trial counsel did not attempt to proffer Ms. Hanks’

testimony to the Court outside the hearing of the jury. Based on my finding above, had they done so, the trial court would likely have permitted Ms. Hanks' testimony.

Trail counsel wanted to put Ms. Miller's testimony into evidence. This is not a case of trial counsel failing to recognize the impeachment testimony. But rather, trial counsel wanted to use the impeachment testimony, but could not figure out how to properly get the same before the jury (or the trial court outside the hearing of the jury for an on the stand proffer).

In Black v. State, 151 S.W.3d 49 (Mo. banc 2004), the Supreme Court of Missouri specifically recognized an ineffective assistance of counsel claim based largely on trial counsel's failure to use impeachment evidence.

This decision was based on the Court's recognition that "the right to cross-examination is essential and indispensable, and 'the right to cross-examine a witness who has testified for the adverse party is absolute and not a mere privilege.'" *Id.*

Accordingly, trial courts have "no authority to prevent impeachment of the State's witnesses on matters related to a paramount issue or that affected either accuracy, veracity, or credibility had counsel sought to do so." *Id.* at 56.

As the Supreme Court specifically recognized, "[b]y their nature, such issues are not collateral." *Id.* Thus, in Black, the Missouri Supreme Court held that trial counsel's failure to impeach a witness can amount to ineffective assistance of counsel where the movant can "show that had the witness been impeached, it would have provided a viable defense or otherwise meet the *Strickland* standard." *Id.* at 53.

As in Black, there is no dispute here that trial counsel's decision not to impeach Shelby Magnuson was not one of strategy, but rather of failing to lay the proper

foundations and follow the proper procedures to be able to impeach her directly and through the testimony of Michelle Miller.

Further, due to the doctrine of law of the case, the Court of Appeals Memorandum, sets forth that trial counsel failed to preserve these issues for appeal. (Ex. 6 at pp. 15, 17). (Although highly overlapping, preservation for appeal might not in and of itself be an issue for 29.15 relief, but the act of failing to lay proper evidentiary foundations to admit the subject testimony at trial is).

The Court finds that there was no credible strategy for not doing so, especially after, but not limited to, when the state used similar information to impeach Mr. Borst. Any fears otherwise expressed for strategy purposes were already far surpassed.

The failure to lay the proper foundation to call Ms. Miller to the stand and/or make an on the stand- proffer with Ms. Miller as to the ex-wife's prior false-allegations of abuse was ineffective assistance of counsel and was prejudicial to the defendant. Ms. Miller's testimony and her demeanor corroborated that the ex-wife does create fictitious reports of child abuse when she feels threatened and/or to get her way. Although Mr. Borst still utilized the defense of set-up, the defense of set-up that he was able to present was very limited and did not include the history of false accusations that would have supported Movant's defense.

Further the totality of Mr. Carney's testimony and demeanor raises grave concern in the Court's mind as to whether Mr. Carney's met the "zealous representation" required by the Code Of Professional Responsibility.

The performance of Mr. Carney was not only deficient in the respects that have been described by the Court in its findings above, but also that deficiency did in fact prejudice Movant's defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Movant

has satisfied both the performance prong and the prejudice prong, and Movant does therefore prevail on his ineffective assistance of counsel claim." *Sanders v. State*, 738 S.W.2d 856, 857 (Mo.banc 1987) (emphasis in original).

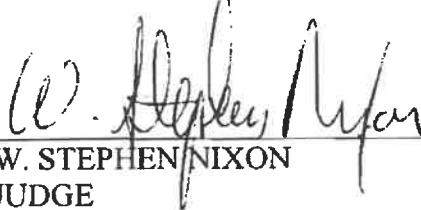
JUDGMENT AND ORDERS

IT IS HEREBY ORDERED AND ADJUDGED that Movant Christopher P. Borst's sentences and convictions are set aside as to his criminal liability for Counts 2, 4, 6 and 8 of the Indictment.

IT IS FURTHER ORDERED AND ADJUDGED that, because the jury found Mr. Borst not guilty as to Counts 1, 3, 5, 7 and 9, double jeopardy prevents retrial thereon.

IT IS FURTHER ORDERED AND ADJUDGED that a new subcase shall be set up for the criminal case by the Court Administrator-Department Of Criminal Records.

Dated: JULY 21, 2009


W. STEPHEN NIXON
JUDGE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed via U.S. First Class mail, postage prepaid, on JULY 21, 2009, to:

Criminal Records

JOHN P. O'CONNOR
4740 GRAND AVENUE, SUITE 300
KANSAS CITY, MO 64112-2255

MICHAEL L. BELANCIO
1100 MAIN STREET, SUITE 2600
KANSAS CITY, MO 64105

LORI A. FLUEGEL
ASSISTANT PROSECUTING ATTORNEY
JACKSON COUNTY COURTHOUSE
415 EAST 12th STREET
KANSAS CITY, MO 64106

/s/ Sue Akers
Judicial Administrative Assistant
Division 5